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ELIMINATION OF IMPROPER EVIDENCE.

Incorrigibility of Mistake in Admitting Evidence

In some early cases, the doctrine was propounded that when evidence was once heard by the jury, it would affect their decision, despite any effort made by the court to eradicate it from their minds. In an action for money had and received, plaintiff gave evidence which tended to impeach the honesty of the defendant. In the cross-examination of one of the plaintiff's witnesses, defendant was allowed despite objection to ask what the general character of the defendant was, and the answer was that it was good. As the action was a civil one, and the character of the defendant was not in issue, this was improper. Before the bill of exceptions to the admission of the evidence was actually sealed, the court, thinking an error had been committed, told the jury to dismiss the evidence from their minds and pay no regard to it. A judgment for the defendant was reversed, Gibson, J., saying that the error "could not be cured by any after act." The impression could not be entirely removed. Even if it could, the Supreme Court could not be certain that it had been. The quantum of the effect

is immaterial.[1] In an earlier case,[2] ejectment, a report of arbitrators in favor of the defendant from which an appeal was had, was, on the trial before the jury, read to them, on the mistaken supposition that, being a part of the record of the case, the jury had a right to hear it. Thinking that the jury had no right to be influenced by it, the court at the same time told them that they were to pay no regard to it. The judgment for the defendant was reversed, because the opinion of the arbitrators would be "very apt," said Tilghman, C. J., to influence the decision of the jurors, "in spite of all the caution they may receive from the court." Later opinion is that the jury can and will heed the direction of the court to disregard evidence that has been heard. Should the verdict suggest that the direction of the court was not heeded, a new trial would be the remedy.[3]

In Derling v. Williamson,[4] a deposition was offered in evidence. Counsel for the party adversely affected by it, objected but the deposition was admitted. After it was read the party excepted to a portion of it, and asked the court to reject it or give a bill of exceptions. This the court refused to do, saying that there had been no special exception to this part of the deposition. Says Rogers, J., "We are not satisfied with the reasons assigned. It is an undoubted right, of which a party cannot be deprived, that, when he discovers, at any stage

[1]Nash v. Gilkeson, 5 S. & R. 352. See Canal Co. v. Barnes, 31 Pa. 198; Cf. Ingham v. Crary, 1 P. & W. 389.

[2]Shaeffer v. Kreitzer, 6 Binn. 450; Ridgely v. Spencer, 2 Binn. 70.

[3]Unangst v. Kraemer, 8 W. & S. 391. In Rider v. Maul, 70 Pa. 15, Agnew, J., says: We are not to suppose that the jury will disregard the peremptory instruction of the judge to exclude evidence from consideration. In 31 Pa. 198 and 246 Pa. 294, the Supreme Court sees in the verdict evidence that the jury improperly considered the evidence.

[4]9 W. 311.

of the cause, that improper testimony has been inadvertently received, he may have the error corrected, on application to the court. When the attention of the court is called to it, it is their duty promptly to reject it, and the sooner the minds of the jury are disabused, the better; they ought not to be permitted to be influenced by testimony not properly nor legitimately before them. The party injured may have it corrected, either at the time it is discovered, or he may request the court to charge the jury to disregard it."

Striking Out Evidence

One phrase often used to designate the process of eliminated evidence that has been received, is "striking out." It behooves us to ascertain what is meant by these words. The relevant definition of "strike out" given by the Standard Dictionary is "To cross out, as with a pen or pencil; cancel; expunge; as, to strike out a letter; to strike out the enacting clause of a legislative bill." That of Webster is "To blot out, to efface, to erase." "To methodize is as necessary as to strike out," and a sentence from Pope is given as an illustration. Similar is the definition of the Century Dictionary: "To efface with a stroke of a pen; erase; remove from a record as being rejected, erroneous or obsolete." Macauley's Hist. England furnishes an illustration: "Halifax was informed that his services were no longer needed, and his name was struck out of the Council Book." The expression "Striking out" evidence seems to presuppose that a written memorial, notes, a record of the evidence was in contemplation, from which the minute of the peccant evidence was to be expunged. But, in jury trials there was no record of the evidence. It was the duty neither of the judge,[5] nor of counsel, or

[5]Miles v. O'Hara, 4 Binn. 108; Foster v. Shaw, 7 S. & R. 156; Livingston v. Cox, 8 W. & S. 61.

any other person to make such record, and in many cases nobody made even the most fragmentary minutes. Literally, there could be no "striking out" of testimony, when there was no written embodiment of it. And, if there had been an official writing of the evidence, there would probably have been no literal "striking out" of any portion of it. The writing would remain not exscinded, not rendered illegible; not defaced even with cancellations. The expression, "stricken out" would be simply a written manifestation that the writing "struck out" was to be treated as if it had not been written, and the evidence embodied in it as if it had not been delivered; that is, that the evidence was to be disregarded by the fact—decider, jury or judge, or auditor, in his reflection on the case, with a view to the framing of a decision. In short, to "strike out" would be simply to express a purpose that the evidence should be disregarded; that no attention should be given to it.[6]

Memory of Jury

The evidence is addressed to the jury, and what the jurors hear they more or less perfectly remember. An order to "strike out" is plainly not an order to eliminate the reprehended evidence from the memory. It is simply a direction that the jury shall not give attention and attribute value to such evidence, in its deliberations and decisions. An order to "strike out," is necessarily, an order to disregard. It can be nothing more.[7]

[6]Robinson v. Snyder, 25 Pa. 203. Black, J., seems to regard the expressions as equivalent to each other.

[7]In Aitkin's Heirs v. Young, 12 Pa. 15, Rogers, J., seems to have thought that the proper way to get rid of evidence which it was not error to admit but which subsequent evidence showed to be irrelevant, was to ask the court to instruct the jury to disregard it.

Distinction Between Striking Out and Directing to Disregard

Despite the wholly unsubstantial nature of the distinction between "striking out" evidence, and ordering a jury to disregard it, some judge, during a temporary occultation of his perceptive powers, made the distinction. Perhaps it was Thompson, J., who, when evidence had been received with objection, which the court declined, on motion, to strike out, observed that it was not error to decline to strike out, but intimated that it would have been error to refuse to instruct the jury to disregard it, i. e., to consider it as if it had been struck out.[8] Without apparent reflection, Sharswood, J., follows with the statement "We have invariably, (that is, on three or four occasions,) held the distinction."[9] Then follow Justices Moschzisker,[10] and Potter,[11] and, in the Superior Court, Rice, P. J.[12]

Practical Results of the Verbal Distinction

There are cases in which evidence having been introduced by which the jury ought not to be influenced, it is sought to be withdrawn by a motion to "strike it out," and other cases, in which the same object is sought by a request to the court to instruct the jury to disregard it. A priori, one would have said that the success of the application could not, in a rational system of jurisprudence, depend on the use of one or the other of these phrases. Such a vaticination would have been egregiously mis-

[8]Ashton v. Sproule, 35 Pa. 492. The same judge, repeated the inane distinction, in Oswald v. Kennedy, 48 Pa. 9.

[9]Yeager v. Weaver, 64 Pa. 425.

[10]McDyer v. East Penns. Rys. Co., 227 Pa. 641.

[11]Weller v. Davis, 245 Pa. 280.

[12]Klein v. Levenson, 50 Pa. 132.

taken. In a suit against an endorser of a note, the protest made nearly six years after the note matured was put in evidence by the plaintiff without objection. After the defendant had concluded his evidence, he moved the court to strike out the evidence of the protest. The court refused. Says Thompson, J., "I know of no practice to justify an exception to the refusal of a court to strike out evidence, which has been received without exception. Being in, the only alternative that remains to the party who thinks he has cause to complain of it, is to pray the court for instructions in regard to its effect. This was the course the plaintiff might have pursued here."[13] That is while it is not reversible error for the court to refuse to strike out evidence, it would be reversible error for the court to decline to tell the jury that their verdict could not be shaped with reference to it; that they must disregard it. In a suit by Kennedy,[14] against several for false imprisonment, one of his witnesses testified that he heard some one in the crowd, which arrested Kennedy, say a pistol was presented to him, to stop him. On his cross-examination, this witness said he could not say who made the remark concerning the pistol. The court was asked, by defendant, "to withdraw from the jury" the testimony about the pistol. It declined, saying it would submit it to the jury. As the evidence had not been objected to otherwise than by the motion to withdraw, Thompson, J., observes "the party has no other remedy than to ask the court to charge that it be disregarded, which, if refused, and the evidence be improper, the injury can be repaired by writ of error." It is no error, that is, to refuse to strike out, that evidence which it would be error to refuse to tell the jury to disregard! In an action for death from personal injuries from a collision with a railroad train, Dr. G

[13]Ashton v. Sproule, 35 Pa. 492.
[14]Oswald v. Kennedy, 48 Pa. 9.

called for the plaintiff, testified that he had been duly registered as a physician in Pennsylvania. His testimony was admitted without objection. Subsequently, defendant produced evidence showing that Dr. G was not licensed to practice in Pennsylvania, and moved to strike out all his testimony. The court refused. Error was assigned to this refusal. Moschzisker, J., says, "After the testimony has been received without objection,[15] the refusal to strike it out is not reviewable. In such a case the only course is to request the court to instruct the jury to disregard the testimony, and upon a refusal, to assign error."[16]

Refusal to Strike Out, When Error

That it may, under some circumstances, be the duty of the trial court to strike out evidence, which has been received without objection is recognized. Black, J., says "It is not the duty of the court to strike out evidence admitted without opposition, except in cases where the ground of objection was unknown to the adverse party at the time he consented to it, and when it is plain that his ignorance was not wilful for, if he could have seen the incompetency by the exertion of due diligence, it is the same as if he did see it." He illustrates by the case of evidence of an incompetent witness, the fact making whom incompetent was "a secret which or-

[15]But it does not appear that defendant knew of the ground of objection at the time the testimony was being delivered.

[16]McDyer v. East Penna. Rys. Co., 227 Pa. 641. The same doctrine is announced by Potter, J., in Weller v. Davis, 245 Pa. 280; where a witness made answers to the judge's questions, and no objection was made at the time and a motion later to strike out was refused. Cf., also Klein v. Levenson, 50 Super. 132; Mogel v. Reeser, 5 Berks 341; W. S. Telegraph Co. v. Wenger, 55 Pa. 262; Owen v. Schmidt, 37 Leg. Int. 82; Forster v. Rogers Bros., 247 Pa. 54.

dinary inquiry would not have discovered."[17] Yet, the judge strangely adds that no error can be assigned to the refusal to strike out. Only a written prayer for instructions in the charge followed by refusal to give the instruction, will make the court's act reviewable. In estimating damages from the taking of land by a railroad company, a witness estimated the damage as appeared only on his cross-examination with reference to the possibility of erecting glass works or brick yards on the premises. The defendant thereupon moved to strike out this evidence. Although the fact which made the estimate inadmissible was not revealed till the cross-examination, the court declined and without error. The proper course was to ask the court to instruct the jury in regard to the effect.[18] In assumpsit on an accident insurance policy, after the plaintiff had rested, and defendant had offered testimony, the defendant, referring to the constitution and by-laws of the company, which plaintiff had offered in evidence, and which required that when an autopsy was held, the defendant should be notified, and the plaintiff's evidence showing that such an autopsy had been held, without notice to the company, moved the court to strike out the evidence of the autopsy. The court refused, without error, saying that it had been admitted without objection. The motion was not made till the plaintiff's case in chief had closed. The motion therefore came too late.[19] Action against an express company for loss of valuable package. One of the plaintiffs testified to the value of its contents without objection, and he was not cross-examined. The plaintiffs rested. On the following day it appeared that the witness' testimony was based on the records of the firm not

[17]Robinson v. Snyder, 25 Pa. 206.

[18]Gilmore v. Pittsburg, etc. R. R., 104 Pa. 275.

[19]McCullough v. Railway Mail Assn., 225 Pa. 118. Cf. Forster v. Rogers Bros., 247 Pa. 54.

made by himself. The court, was then asked to strike out his testimony. Its refusal to do so was not error. "Under the circumstances," its discretion was not "abused."[20] Yet, so far as appears, the defendant's delay in objecting (by his motion to strike out) was not the result of negligence; nor would it have been impracticable for the plaintiff to produce other evidence of value.

When Error To Refuse To Strike Out

When, says Justice Moschzisker, an immediate objection is interposed to evidence, followed at once by a motion to strike out, or where, before the witness leaves the stand, the incompetency or irrelevancy of a material part of his testimony is clearly shown by him, the refusal to strike out, when a prompt motion thereto is made, will be error.[21] Trespass for destruction of plaintiff's house by dynamite. A witness stated without objection his judgment of the value of the house. He then showed that his opinion was founded on the rents which had been received, and which he deemed fair. Immediately, defendant asked that the opinion of value be stricken out. The refusal of the court was error.[22] Proceeding to assess damages from the taking of land by a railroad company. Witnesses testified as to the damages sustained, without objection. On cross-examination they said that they estimated the damages by dividing the land into lots, fixing the price at which they would sell, and multiplying the price by the number of lots. It was error for the court to decline to strike out the testimony of the witnesses on a motion to strike out, made immediately after the witness revealed the method of his com-

[20]Caldwell v. U. S. Express Co., 36 Super. 465.
[21]Forster v. Rogers Bros., 247 Pa. 54.
[22]247 Pa. 54.

putation of damages.[23] Action for damages for injuries from collision with an automobile, operated by X, but belonging to Z. Z, a witness for the plaintiff, testified that it was his car which struck the plaintiff. He had learned this, as appeared from his cross-examination, the morning after the accident from C, his chauffeur. There was no objection to the evidence. The trial lasted through the day. In the evening the defendant moved for a compulsory non-suit. This was refused, and the case of the defendant was opened. On the court's reconvening the next day, defendant moved to strike out Z's testimony, since it was founded on hearsay. The plaintiff objected to the striking out, because Z had left the court room. The court refused to strike out. Mestrezat, J., approving, remarks that "There is little doubt if a proper motion to strike out Schmeltz's (Z's) testimony from the record had been promptly made, the court would have granted it." Had the motion been promptly made, plaintiff might have been able to prove the same fact, or conducted the case on a different theory.[24] Delay in making the motion may then justify a refusal to grant it, which, had it been prompter, it would have been error to refuse. Action for personal injuries. A witness for the plaintiff testified that the keg of powder carried by James Smith was exploded by coming in contact with a trolley wire. He admitted, on cross-examination that he did not know James Smith, but that he had afterwards learned from other parties that it was James Smith who carried the keg of powder that was exploded. This was

[23]Kleppner v. Pittsburgh, etc. R. R., 247 Pa. 605. When a witness volunteers testimony that is irrelevant or incompetent, the proper practice is to move the court to strike it out, and if the court refuses to do so, take an exception. In that way the matter is fairly brought upon the record for review. Broadnax v. R. R., 157 Pa. 140.

[24]Luckett v. Reighard, 248 Pa. 24.

clearly hearsay evidence and if these facts had appeared when it was offered in chief, it would have been the duty of the court to exclude it." On the subsequent disclosure of these facts, it was the duty of the court to strike out the evidence when the motion to do so was made.[25]

Refusal To Strike Out When Not Assignable As Error

Several cases state generally, that, if evidence is received without objection at the time, the only proper course is to request the court to disregard the evidence. The refusal of a motion to strike out, is not the subject of a bill of exceptions.[26] Action for breach by owner of hotel of contract to make a lease of it. The plaintiff testifying as to the value of the lease, based it on the profits he would have made, per year, had he had possession of the hotel. A motion to strike out this evidence was refused. The Supreme Court refused to reverse, saying, through Sharswood, J., "We have invariably held that the refusal of such a motion is not the subject of a bill of exceptions." The same doctrine appears, as late as 1914 in Weller v. Davis.[27]

Request To Strike Out Too Broad or Vague

If the testimony of a witness is in part unobjectionable, a motion to strike it all out, not distinguishing the objectionable part from the unobjectionable, will be properly refused, even if it might have been error to

[25]Pauza v. Lehigh Valley Coal Co., 231 Pa. 577. Cf. Miller v. Windsor Water Co., 148 Pa. 429.

[26]Yeager v. Weaver, 64 Pa. 425; Oswald v. Kennedy, 48 Pa. 9; Ashton v. Sproule, 35 Pa. 492; Montgomery v. Cunningham, 104 Pa. 349; Levenson v. Robinson, 141 Pa. 189; U. S. Telegraph Co. v. Wenger, 55 Pa. 262; Owen v. Schmidt, 37 Leg. Int. 82; Gilmore v. Pittsburgh, etc. R. R., 104 Pa. 275.

[27]245 Pa. 280.

refuse, had the motion been properly qualified. It would be error to strike out the whole of the evidence because a part of it was improper.[28] The court is not bound to separate the proper from the improper part of the evidence, when a motion to strike out the whole is made; and, on the refusal to strike out, the disappointed party cannot pick out the improper portion and assign the failure to strike it out, as error.[29] A large mass of testimony having been offered, concerning the value of land which the city was taking for a reservoir, a general motion was made to strike out the testimony as to what might have been the value of the land if it were cut up into lots, on streets, which might have been opened. This the court properly refused. "It would have been very difficult if not impossible for the parties in interest to know how much of the 150 pages of plaintiff's testimony had been stricken out."[30]

Estoppel Against Objecting To Evidence

If evidence, the objectionableness of which is manifest, is offered and without opposition received, the court may, probably, refuse without error, to strike it out, or to direct the jury to disregard it. A party may moreover, not simply by his inaction, but by a positive agreement preclude his right to the exclusion of the evidence. Appeal from a judgment of a justice of the peace, in favor of plaintiff. The claim was $285; the price of fruit cans. Defendants offered evidence without objection

[28]Miller v. Windsor Water Co., 148 Pa. 429; Hamilton v. Pittsburgh, etc. R. R., 194 Pa. 1; Wilson v. Equitable Gas Co., 152 Pa. 566. No objection was made to a question. Part of the answer was responsive. The motion to strike out the whole of the answer was, therefore, properly denied. Smith v. Cunningham Piano Co., 239 Pa. 496.

[29]52 Pa. 566.

[30]Warden v. Philadelphia, 167 Pa. 523.

that the defective character of the cans had caused him a loss of $442.81. When the case was closed, plaintiff asked the court to withdraw from the jury the evidence in defense, because the set-off exceeded $300. The court's refusal was approved by the Supreme Court because it clearly appeared that technical objections were waived, and by mutual consent, the case was tried upon its merits, as though the suit had been originally brought in court.[31]

Atoning For Reversible Error By Instruction

If the court mistakenly admits evidence, despite the objection of the party adversely affected by it, it may save itself from reversal, by striking out, of its own motion, or possibly by giving adequate instruction in the charge. Suit against a borough, for damages from widening, grading, and paving streets. Evidence was improperly admitted that the work was done for the borough by a traction company, which would be liable over to the borough for damages recovered from it. This tended to make the jury more liberal in estimating the damages. An instruction in the charge to disregard the evidence, came too late. It was also not sufficiently explicit that there would be no indemnification from the traction company.[32] The error may be deleted, by the court's heeding a request, at the close of the objectionable testimony, to strike it out. If the court refuses, the error originally made remains, and advantage can be taken of it in the appellate court.[33] Proceeding for damages from the construction of a railroad. Evidence of the effects of smoke, dust, noise, on the value of the land was received, despite objection, and at the conclusion of

[31]O'Ferrall v. Moore, 127 Pa. 234.
[32]Martin v. Baden Borough, 233 Pa. 452.
[33]Willock v. Beaver Vy. R. R., 229 Pa. 526.

the witness' testimony, a motion to strike it out was made, but refused. The judgment was reversed.[34].

Who May Ask To Strike Out

Not merely the party against whom the evidence has been offered, but the party offering it, may, under certain circumstances, procure its striking out. If there was no error in the admission of it, the party offering it may be sacrificing something of value, in asking that it be stricken out. Action for collision with plaintiff, by defendant's automobile, driven at an excessive speed. Plaintiff called witnesses to say that it was being driven at the rate of 40 or 50 miles. Subsequently, doubting whether a non-expert witness could estimate the rate, he moved to strike out. Although the motion was opposed by the defendant, the court granted it. Says Mestrezat, J., "Being of opinion that the testimony, the admission of which is alleged to be erroneous, was properly admitted, the subsequent action of the court in striking it out on motion of paintiff's counsel becomes immaterial. The plaintiff, not the defendant, was injured by the ruling, and hence the latter has no cause to complain."[35] Strong, J., remarks,[36] a mistake in the admission of evidence may be rectified. "It may be withdrawn by the party who has given it, or the court may withdraw it, and positively instruct the jury to disregard it—to discard it from their view." Plaintiff offers the record of a judgment on a note for $100. It was admitted under exception. Discovering that this was

[34]Willock v. Beaver Vy. R. R., 229 Pa. 526.

[35]Dugan v. Arthurs, 230 Pa. 299. If the evidence had been useful to the defendant, could the plaintiff properly have it withdrawn?

[36]Delaware, etc. Canal Co. v. Barnes, 31 Pa. 193; quoted in Rosenstiel v. Pittsburgh Railways Co., 230 Pa. 273.

not the note intended, the plaintiff then withdrew the record. No error was committed in allowing this. No injury could result to the opposite party. If the evidence were not withdrawn, the trial would have to stop, or the judgment recovered would be reversible.[37]

Striking Out Without Request

Evidence, injurious to a party may be offered, and excepted to. The court may admit it thinking that it will be followed by other evidence which will reveal its relevancy. If this expected evidence is not subsequently presented, the court should, even if no motion is made, strike out the evidence already in, whose admission could be justified only if it was supplemented. In a prosecution for conspiracy to imprison falsely, acts and declarations of persons other than the defendants were proved without first showing a connection between these persons and the defendants. Such connection was not subsequently shown. The defendants having excepted to the evidence, it was not necessary that they should also move to strike out, in order to take advantage on appeal of the improper admission.[38] Where there is no exception by a plaintiff to evidence offered by the defendant; (he cross-examines the witness, and makes no objection), and no request is made to strike out the evidence, it is error of which the plaintiff may complain for the court to strike out the testimony. "The plaintiff", suggests Green, J., "may have had a very good reason for desiring this testimony to remain in the case, and undoubtedly had a right to have it considered."[39]

[37]Miller v. Miller, 4 Pa. 317.
[38]Com. v. Duffy, 49 Super. 344.
[39]Lewars v. Weaver, 121 Pa. 268.

MOOT COURT

HOLLOWAY'S ESTATE

Sale—Real Estate—Conversion—Decedent's Estates

STATEMENT OF FACTS

Holloway contracted to convey for $4000 his land to Slocum, if Slocum should within three months notify him by writing that he would accept the conveyance. Four weeks thereafter, Slocum gave the notice, and two weeks later Holloway, not having made the conveyance, died largely indebted. Eighteen months after Holloway's death, the widow and children conveyed land to Slocum and received and divided amongst themselves the $4000. The administrator has filed an account which omits all reference to the $4000. Creditors insist that he be surcharged.

Zigmand, for the plaintiff.

Borton, for the defendant.

OPINION OF THE COURT

GANGEWER, J. The first question which presents itself is, What interest had Holloway in the land after he contracted to convey it to Slocum in consideration of $4000?

A sale of real estate is in equity a conversion of land into money. The vendor's interest becomes a chose in action, which in case of death goes to his personal representative and the legal title is held only as a security for the payment of the debt. Bender v. Luckenbach, 162 Pa. 18; Rose v. Jessup, 19 Pa. 280; Leifer's Appeal, 35 Pa. 420; Foster v. Harris, 10 Pa. 457.

When Holloway contracted to sell and Slocum to buy the land, the interest Holloway had in the land was converted from realty into personalty. Holloway, it is true, was the holder of the legal title, but he held it only as security for the purchase money; in case that Slocum would not take the land, the legal title again would vest in Holloway without encumbrance of any kind against it. On the other hand if Slocum was willing to pay the purchase money and Holloway would refuse to convey the legal title to Slocum, the court would grant specific performance and compel Holloway to transfer the legal title to Slocum. As Holloway's interest in the land was converted from realty into personalty, the

purchase money should have gone to Holloway's personal representative and not to the widow and children.

In Simmons Est., 140 Pa. 567, it was held: "Personal representatives have absolute control of the fund. By contract of sale of land the estate of descendant is converted into personalty over which the personal representative has complete control." And in Longwell v. Bentley, 23 Pa. 99, it was held: "The vendee becomes in substance the owner of the estate. In his hands it is subject to dower and curtesy and to all the incidents of real estate, and upon his death it goes to his heirs and not to the personal representative. This conversion takes place notwithstanding that it may afterward be defeated by the non-payment of the purchase money."

The answer to the question, What interest had Holloway in the estate? is that his interest was converted into personalty and should have gone to the administrator on Holloway's death and not to the widow.

The second question is, Can the administrator be surcharged for the amount of $4000, by allowing the widow and children to distribute the said sum amongst themselves?

"An administrator being a mere judiciary is bound to perform his duty, not only with fidelity, but with proper skill and reasonable diligence so as to promote the interest of those sharing in the estate." Wiley's Appeal, 8 W. and S. 246. The creditors were interested in Holloway's estate to the extent of the amount of their claims against it. The administrator by allowing the widow to collect the $4000 was not performing his duty with proper skill and reasonable diligence, but on the other hand was very negligent in leaving the creditors' accounts unpaid.

"An administrator who is guilty of gross negligence in the collection of the debts due the estate is personally liable for them, if lost thru his delay in enforcing payment." Charlton's Appeal, 34 Pa. 473. The administrator certainly was grossly negligent in allowing the widow to collect the $4000. The facts state that it was 18 months before the widow collected the money, such delay in itself is negligence enough to make the administrator liable. One year would be a reasonable time to collect such a debt and in allowing the debt to remain unpaid for the period of 18 months is gross negligence on the part of the administrator.

"When an administrator does nothing where money is due to an estate and makes no effort to collect, though cognizant of the existence of the claim, he is guilty of a palpable breach of trust." Tilghman v. Fisher, 9 Watts 44. And in Haines' Estate, 5 Lu-

zerne Law Times 56, it was held: "It is the imperative duty of an administrator to proceed to collect all debts due the estate without delay. Any loss to the estate thru his lack of diligence and prudence must be surcharged against him."

In the case at bar, the administrator, by allowing the debt to remain unpaid for 18 months and by permitting the widow to collect it, was grossly negligent and should have the amount surcharged against him.

All that remains is to determine the amount to be surcharged. In Reiff's Appeal, 2 Pa. 256, it was held: "An administrator permitting goods to remain with the widow is chargeable at appraisement."

In view of this authority, we think that the administrator should be surcharged with the entire purchase price of $4000.

Judgment is here rendered accordingly.

OPINION OF SUPREME COURT

It is unquestionably true that "in the case of a vendor's death, where he is under a contract to sell land, his heir receives the title in trust for the vendee and must convey upon payment of the purchase money, however the purchase money goes not to the heir, but to the personal representative of the vendor, for the vendor's interest has been converted by the contract from realty into personalty." 6 Pomeroy's Equity 1375.

Finding that the administrator in this case was negligent, and applying the principle stated, the learned court below has decided that the administrator should be surcharged for $4000. In so deciding he has not adverted to the fact that it does not appear that the wife of Holloway had joined in the contract to convey.

If Mrs. Holloway did not join in the contract to convey, her right to dower became consummate by the death of her husband. Although this right was a mere chose in action and not an estate in the land, it was a right which she could sell and assign and this assignment could be effected by joining with the heirs in making a deed of the land.

The question therefore is, Was the transaction between Mrs. Holloway and Slocum a new contract by which Mrs. Holloway sold her dower interest to Slocum, or was it simply an attempted execution of the contract between Mr. Holloway and Slocum?

In the former case Mrs. Holloway would be entitled to a portion of the entire purchase price, and therefore the administrator could not properly be surcharged therewith. In the latter case the judgment of the court below is correct.

There is nothing to indicate that the transaction between Mrs. Holloway and Slocum was intended as a new contract between them for the sale of the dower, so the learned court below committed no error in assuming that it was intended as an execution of Holloway's contract. Judgment affirmed.

POTTER v. SIMOND

Vendor and Vendee—Option to Purchase—Equity—Bill to Remove Cloud on Title—Burden of Proof

STATEMENT OF FACTS

Potter agreed with Simond in writing to convey to the latter a piece of land, if, within four months, Simond would notify him in writing that he would accept a conveyance and pay Potter $4000. Eight months thereafter, Simond, not having by writing or otherwise, within the four months or later, accepted the conveyance, put the contract for the option on record. This is a bill by Potter, alleging that the putting of the contract on record is a cloud on his title, and praying for a decree that the option had become null and void, that it be delivered up to Potter and its record cancelled. The court, holding that there was not sufficient evidence that the option had not been exercised by the defendant, dismissed the bill which averred that it had not been exercised. The court said that the burden was on the plaintiff to prove his allegation. Appeal by the plaintiff.

LaRossa, for the plaintiff.

Blumberg, for the defendant.

OPINION OF THE COURT

PAUL, J. An option is a privilege existing in one person which gives him a right to buy certain merchandise from another person, if he chooses, at any time within an agreed period. Black's Law Dictionary, p. 856.

The contract in question gave Simond the right to buy the land, if he was so inclined, any time within four months. This contract, therefore, is clearly an option. Time was made the essence of the contract, and the right to buy must be exercised within the specified time or it is lost. Van Kirk v. Patterson, 201 Pa. 90; Bosshardt v. Oil Co., 171 Pa. 109.

In Neil v. Hitchman, 201 Pa. 207, the court was confronted

with the same set of facts, and, as to the burden of proof, which is the basis of this appeal, said: "All the plaintiff is required to do to establish his right to have the option cancelled is to show that the defendant had recorded it and was asserting his rights."

The burden is upon the defendant to prove that he has performed his part of the contract. The mere act of recordation does not show this, but he must go further and show that he performed his part within the time specified in the option. What could be the purpose of a time limit if it could be extended at the instance of one party? There must be mutuality in the making of the original contract and there must likewise be mutuality in the extension. At the expiration of the four month period, Potter was free to sell the land or to give a similar option to another person. The conduct of the defendant was an interference with this privilege, and, hence, a cloud on the title of the plaintiff.

The lower court erred in requiring further proof of the failure of the defendant to take advantage of the option. The averment in the bill of the plaintiff is sufficient when it recites that the option has not been exercised, for the burden is upon him who denies the allegation to prove his right.

We therefore order that the option be delivered up for cancellation and the record be cleared of the same.

OPINION OF THE SUPREME COURT

Protracted discussion of this case is made unnecessary by the opinion of the learned court below.

The right conferred on Simond was to decide to purchase the land and to communicate his decision in writing within 4 months. He has allowed the period to elapse, and four additional months, and he has not yet signified his purpose to buy the land, and to pay $4000 for it. No facts appear which could justify the prolongation of the option. Potter might well have been willing to restrict his power to dispose of the land otherwise than by a sale to Simond, for the period of four months, and have been unwilling to restrict the power for a longer time.

The option-contract is put on record. It does not disclose the facts which have terminated it. Persons seeing the record of it, might well believe that it was still valid. The act of putting it on record, was a distinct assertion by Simond that he intended to claim the land in pursuance of it.

Plainly then, there was a cloud on Potter's title. The dissipation of such clouds is one of the duties of a court of equity.

The court below has properly decided that the option and the record of it must be cancelled. Affirmed.

WILLIAM BERNARD v. JACOB THOMAS

Decedent's Estates—Intestate Law—Descents—Act of May 25, 1887, P. L. 261

STATEMENT OF FACTS

X, having contracted to sell his land to Bernard and having received a part of the money, died. Bernard took possession. Before completing the payment of the purchase money, Bernard died, leaving a son John. His administrator completed the payment of the purchase money and received a deed, naming him as grantee in trust for John Bernard. John Bernard died when he was sixteen years old. His uncle on his mother's side, Jacob Thomas, claims to have inherited the land; his uncle on his father's side, Wm. Bernard, claims to have inherited it to the exclusion of the maternal uncle. The court decided that they share equally.

Strite, for the plaintiff.

Davies, for the defendant.

OPINION OF THE COURT

GOLDBERG, J. The question upon which the case depends is, Shall the maternal relations of a decedent who has inherited real estate from his father share equally with the paternal relatives of the same degree of consanguinity? The act of May 25, 1887, P. L. 261, reads as follows:

"No person, who is not of the blood of the ancestors or other relations from whom any real estate descended, or by whom it was given or devised to the intestate, shall, in any of the above cases before mentioned, take any estate therein, but such real estate shall pass to and vest in such other persons as would be entitled by this act, if the persons not of the blood of such ancestors or other relations had never existed, or were dead at the decease of the intestate."

The words of the act explain themselves and apply directly to the case at bar. John inherited the land from his father. At John's death the land was claimed by both the paternal and maternal relatives. The act specifically states that the land shall go to the original grantor's blood relatives, in this case to the paternal relative, Wm. Bernard.

In Sturgeon v. Hustead, 196 Pa. 148, the court held that the maternal relatives took the estate to the exclusion of the father when the son inherited the land from his mother. This case shows the strict construction which the courts put upon the

The fact that Bernard died before completing the payment of the purchase money and that the balance of the purchase money was paid by his administrator is immaterial. This point was decided in Hustead (appellant) v. Langhead, 203 Pa. 168, where the court held: "When the administrator completes the purchase of land contracted for by his intestate, the heirs take it by descent from the intestate."

In view of the above authorities the judgment of the lower court must be reversed.

OPINION OF SUPREME COURT

Bernard, by his contract, became indebted to X for the unpaid purchase money. Not having been paid at his death, it was a debt payable by his administrator. It has been paid by the administrator. Bernard is the purchaser not simply of an undivided third of it, if the money paid by him before death was one-third of the entire purchase money, but of the integral interest. The principle then, that the next of kin on the side of the perquisitor will inherit, to the exclusion of others, even nearer of kin, confines the inheritance from John Bernard, to his uncle on his father's side.

The learned court below has properly allowed the plaintiff in the ejectment, the paternal uncle, to recover the entire land from the maternal uncle. Affirmed.

HOYT v. ASHCROFT

Deed—Reformation of Deed—Mistake—Evidence

STATEMENT OF FACTS

Hoyt files a bill to reform a deed made by him to Ashcroft. The deed describes the land by boundaries and excepts nothing within them. He alleges that he intended to except a building upon the land and that Ashcroft knew that he was intending to retain the building. There was evidence that Ashcroft had said,

since the deed was made, that he did not own the building. As a witness however, he denies that the building was intended to be excepted from the grant. The scrivener testified that the omission to except the building was an oversight. The court decreed that the deed be cancelled and returned to Hoyt, that the record of it be cancelled by a marginal rule of its decree, and that Hoyt make a new deed corresponding with the intention of the parties, as represented by the plaintiff. This is an appeal.

Solsburg, for appellant.

Lichtenstein, for appellee.

OPINION OF THE COURT

BOLOGH, J. The power of equity to reform written instruments is an extraordinary one, its exercise must be carefully guarded and the privilege granted only in a clear case. If an instrument, intended as the execution of an agreement, from some cause is insufficient for that purpose, the agreement remains as much unexecuted as if the parties thereto had refused to comply with it, and equity will carry out the intention of the parties when clearly shown. Hunt v. Rousmainer's administrators, 8 Wheat. (U. S.) 173.

It is settled by numerous authorities that when, because of a mistake of fact, an instrument does not express the agreed intention of the parties, equity will correct such mistake. Stafford v. Giles, 135 Pa. 411; Kostenbader v. Peters, 80 Pa. 438.

In the present case, the plaintiff below testified that he intended to reserve a building upon the land granted to Ashcraft, in this he was corroborated by the testimony of the scrivener, who testified that this was omitted through his error. There was evidence that Ashcroft had said, since the deed was made, that he did not own the building. Against this there is only the defendant's testimony that nothing was said about the building and that the deed expressed the actual transaction.

The amount of evidence required to warrant the reformation of a written instrument is the testimony of at least two witnesses or one witness and corroborating circumstances. In the case at bar we have the testimony of the vendor and the admission of Ashcroft that the building was not his.

Wherever an instrument is drawn with the intention of carrying into execution an agreement previously made, but which by mistake of the draftsman or scrivener, either as to law or fact, does not fulfill the intention, but violates it, there is ground to

correct the mistake by reforming the instrument, and to have specific performance of the original contract according to the real intention of the parties. Baab v. Houser, 203 Pa. 470.

The appeal is dismissed.

OPINION OF THE SUPERIOR COURT

There can be no doubt that if the facts of this are as represented by the plaintiff, it is a proper case for reformation.

The sole question is whether the evidence was sufficient to warrant the court in granting reformation upon the theory that the facts are as they were represented by the plaintiff to be.

The courts are not entirely in accord as to what amount of evidence is sufficient to warrant reformation. In Pennsylvania it is held that the evidence must be "clear, precise and indubitable and of such weight and directness as to carry conviction to the mind." Graham v. Carnegie Steel Co., 217 Pa. 34, and cases therein cited.

The evidence in support of the plaintiff's contention in this case is (1) the testimony of the plaintiff; (2) the testimony of the scrivener; (3) the extra judicial admission of the defendant. Against this there is only the testimony of the defendant, which is not necessarily sufficient to defeat a claim for reformation, 34 Cyc. 988.

The preponderance of the evidence in support of reformation, tho not as great as that in Baab v. Houser, 203 Pa. 470, is nevertheless in our opinion sufficient to comply with the rule and justify reformation.

The decree is affirmed.

HENDRICKS v. LOOMIS

Mining—Lateral Support—Conveyance of Surface — Negligence

STATEMENT OF FACTS

Loomis owned a tract of coal land, composed of A and B. He sold B to Hendricks reserving the coal in it, with the right to extract it without liability for injury to the surface or to the buildings thereon. Loomis continuing to own A mined the coal therein, the effect was ultimately, that the surface fell in along the division line between A and B, and the result of this was, that a strip of the surface of B fell laterally into the hole made by the subsidence of the surface of A. On the strip was a house which was destroyed by the caving in. Hendricks sues for damages to the land for the amount of $2500 and to the home for $1500. It does

not appear that the circumstances made it the duty of Loomis to anticipate the caving in of the surface of A or of the subsequent falling in of B or any portion of it. The court allowed a recovery of $4000.

Motion for a new trial.

Goldberg, for the plaintiff.

Loftus, for the defendant.

OPINION OF THE COURT

BARNHARDT, J. The question to be determined in this case is whether the court erred in allowing damages for both the land and the buildings thereon.

There is no doubt that $2500 should be awarded for damages to the land. 1 Cyc. 777, states: "A land owner has the undoubted right to excavate on his own land and close to the land of the adjoining owner, but he must take reasonable precautions to prevent his neighbor's soil from falling, and if, by depriving the adjoining land of its natural support, he causes it to crumble, sink, or fall away, he will be liable for all damages sustained." The Pennsylvania cases cited thereunder are: Wier and Bells Appeal, 81½ Pa. 203; Carlin & Co. v. Chappel, 101 Pa. 348; Pringle v. Coal Co., 172 Pa. 438.

When an owner of real estate conveys the land to another, reserving the minerals, and thereafter in mining under adjacent lands so conducts operations as to cause a subsidence of the surface of the land previously conveyed, he is liable for the injuries caused by the withdrawal of the lateral support, and this is the case irrespective of the terms of the deed, and irrespective of the question whether he was negligent or not.

The lateral support of the land, to which the owner thereof has an absolute right and for the deprivation of which by his neighbor he can maintain an action without proof of negligence, extends only to the land itself in its natural condition and does not include support for the protection of buildings or improvements thereon. Negligence or want of due care in withdrawing lateral support in excavating or mining adjoining land for which there is liability for injury to a neighbor's buildings means positive negligence, or manifest want of due care in the excavating or mining so far as they affect or are likely to affect adjoining improvements. Matulys v. P. & R. Coal and Iron Co., 201 Pa. 70.

Then in order to determine whether there should be a recovery of $1500 we must first determine if the mining was carried on in a negligent manner. If the mining was carried on in a neg-

ligent manner there is no doubt that Hendricks can recover for both the land and the buildings.

Loomis excavated to the boundary line and the only natural consequence would be that the land deprived of its natural support would fall in after a time. It does not appear that he made any reasonable effort to protect the adjoining property or that he notified Hendricks to do so. One might readily anticipate the falling in of the land and the buildings after their natural support was taken away. By his failure to make an effort to protect the adjoining property Loomis was negligent.

One who makes an excavation on his own land deeper than the foundation of the building upon an adjoining lot, without notifying the owner of the building to protect his property, is liable for the fall of the foundation wall caused by his failure to use ordinary care and diligence to protect it. Spohn v. Pomeroy & Stuart, 174 Pa. 474.

In view of the fact that Loomis was negligent in mining, Hendricks can recover for both the land and the buildings.

Motion for a new trial set aside.

OPINION OF SUPREME COURT

That Loomis is not liable for the damage to Hendricks' buildings, unless he was negligent in the mining operations on his own land, the learned court below recognizes. It decides however, that Loomis was negligent. Whether there was negligence or not, is a question of fact, to be ascertained by the jury. The jury has not found that Loomis was negligent.

Negligence will not be presumed, simply because an unfortunate result flows from one's activity. The mining excavation, wrought by Loomis was on his own land. "It does not appear that the circumstances made it the duty of Loomis to anticipate the caving in of the surface of A, (Loomis' own land) or of the consequent falling in of B, or any portion of it." The language of Brown, J., in Matulys v. Coal & Iron Co., 201 Pa. 70, is applicable here. "There was not only no proof of such negligence here, (i. e. positive negligence, manifest want of due care) but the appellant (Loomis) can fairly say that even if it (he) did not properly support its own surface, it ought not to be charged against it that it should reasonably have anticipated what happened to appellee's surface and the improvements on the same, by reason of its failure to support its own surface."

The court's attribution to the defendant of negligence is unwarranted.

It follows then, that although there was liability for the injury to the ground, there was none for injury to the buildings.

Reversed with v. f. d. n.

PHILLIPS v. LONGFELLOW

Landlord and Tenant—Lease—Forfeiture

STATEMENT OF FACTS

The plaintiff let a house to the defendant for a rent of $400 per year, payable monthly in twelve equal installments. The lease contained a provision for the entry of ejectment and confession of a judgment thereon, should the rent not be paid within six days after it became payable. The defendant made some repairs, which he if any one was bound to make. The repairs cost $25.00 and he sent a check for $8.34 for the rent falling due on March 1st. Phillips returned the check. The defendant then sent on March 2d $8.34 in cash which the plaintiff refused to receive. On March 10th, an action of ejectment and a judgment thereon was entered by the plaintiff. The defendant now asks the court to set aside the execution and strike off the judgment.

Goodyear, for the plaintiff.

Gorson, for the defendant.

OPINION OF THE COURT

LEMISCH, J. There are two questions involved in this case: (1) whether or not the failure to pay punctually, as provided for by the lease, worked a forfeiture; (2) whether or not the tenant was entitled to the amount of money which he paid out for repairs.

There is a wide distinction between forfeitures for failure of punctual payment of money where time is of the essence of the contract and where it is not. If parties choose to stipulate for matters as essential, it is not for courts to say they are not so, but in the absence of a clear agreement for materiality, courts will look into the nature of the transaction, and be governed by the real bearing of the facts upon the intentions and rights of the parties. Hence it is a general rule that where time is not stipulated as essential to a forfeiture for non-payment of money or other matter that admits of accurate and full compensation is provided for as a mere penalty, whose object is to enforce per-

formance of another and principal obligation, equity will relieve against it and will not permit it to be used for a different and inequitable purpose. Lynch v. Gas Co., 165 Pa. 521. In the case at bar no such question enters. The tenant sent the landlord a check on the day on which the rent became due. It is a well established principle of law that checks are legal tender for the payment of rent, unless the landlord has previously notified the tenant of his desire to be paid in money.

The second question, as to the propriety of the tenant deducting the sum which he expended in making repairs, is answered fully by previous decisions. It is said in Trickett's Landlord and Tenant, p. 408: "If the tenant sends a sum of money, which is less than the rent due by a sum which he thinks the landlord owes him, and the landlord in fact, does not owe him, the landlord may refuse to receive it, and annul the lease for non-payment of rent." The case at bar is clearly within this rule, for the facts state that if anyone was bound to make the repairs, the defendant was the proper person to do so.

A case directly in point is that of Pershing v. Feinberg, 203 Pa. 144, which holds: "Where a person (tenant) deducts from an installment of rent certain expenses which he claims to have been incurred in litigation between himself and his landlord, and sends the balance, which is returned to him, and the landlord enters judgment on an ejectment clause in the lease for non-payment of the rent, the court cannot relieve against the forfeiture enforced by the landlord, since the tenant's attempt to collect his claim by deducting it from the rent is unwarranted."

The return of the check was notice that his claim for expenses was not allowed. His attempt to collect the amount he expended in repairs, by deducting it from the rent, was unwarranted, and by his persistence in it he placed himself in a position in which the court could give him no relief. In view of the above cited authorities, the motion is dismissed.

OPINION OF THE SUPERIOR COURT

The judgment of the lower court is affirmed.